

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Americom Las Vegas Limited Partnership)	File No. EB-02-DV-094
)	
Licensee of FM Radio Station KWNZ)	NAL/Acct. No. 200332800006
Carson City, Nevada)	FRN 0003-7662-92
Facility ID # 53706)	

FORFEITURE ORDER

Adopted: May 26, 2004

Released: May 28, 2004

By the Chief, Enforcement Bureau:

I. Introduction

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Americom Las Vegas Limited Partnership (“Americom”), licensee of FM radio station KWNZ, Carson City, Nevada, for willful and repeated violation of Section 1.1310 of the Commission’s Rules (“Rules”).¹ The noted violations involve Americom’s failing to comply with radio frequency radiation (“RFR”) maximum permissible exposure (“MPE”) limits applicable to transmitters on towers.

2. On November 22, 2002, we issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Americom for a forfeiture in the amount of ten thousand dollars (\$10,000).² Americom filed its response to the *NAL* on December 23, 2002.

II. Background

3. KWNZ’s transmission facilities are located on McClellan Peak, near Carson City, Nevada. On November 6, 2001, agents from the FCC’s San Francisco, California, Field Office (“San Francisco Office”) conducted a site inspection at the McClellan Peak antenna site. The McClellan Peak site is on unfenced, publicly accessible property managed by the Bureau of Land Management (“BLM”), located at the junction of three counties, Storey, Washoe, and Lyon Counties, approximately 4 kilometers northeast of Carson City. There are 13 broadcast stations which transmit from the McClellan Peak site. During the November 6, 2001 inspection, the personal RFR monitors worn by the agents began to alarm while in the vicinity of the KWNZ transmitter site. The personal RFR monitors are designed by the manufacturer to begin alarming when RFR exposure levels reach 50 percent of the Commission’s occupational exposure limit. The occupational exposure limit is five times greater than the public exposure limit. Thus, the alarming appeared to indicate that there were RFR levels in excess of the MPE limit for the general public in the vicinity of the KWNZ transmitter.

¹ 47 C.F.R. § 1.1310.

² *Americom Las Vegas Limited Partnership*, 17 FCC Rcd 26689 (Enf. Bur. 2002).

4. On May 1, 2002, the FCC's Denver, Colorado Field Office ("Denver Office") issued a Letter of Inquiry ("LOI") to Americom and 12 other broadcast licensees which transmit from the McClellan Peak site regarding RFR compliance at the site and advising that a site inspection would take place on May 15, 2002.

5. On May 14, 2002, FCC agents from the Denver and San Francisco Offices conducted preliminary measurements in publicly accessible areas throughout the McClellan Peak site. The preliminary measurements indicated that the RFR levels in those areas exceeded the MPE limit for the general public. On May 15, 2002, the agents returned to the McClellan Peak site and conducted additional measurements. The site was easily accessible to 4-wheel drive vehicles from a public gravel and dirt roadway off Goni Road. Two commercial gravel pits were located along the gravel roadway to the site. An ungated internal dirt road led from the gravel roadway to the site, with multiple branches to reach the various antenna structures. The agents observed that there were trails for off-road 4-wheel drive vehicles and all terrain vehicles ("ATVs") along the gravel roadway and at the site itself. The agents also observed members of the public driving ATVs, ATV tire tracks, a campfire ring, beer and wine bottles, and other trash indicative of public use of the BLM site.

6. The measurements taken by the agents on May 15, 2002, indicated that there were RFR fields in publicly accessible areas at ground level that exceeded the FCC's MPE limits for the general public. The agents found spatially averaged RFR fields measuring 0.284 mW/cm^2 , which exceeds the MPE limits for the general public by 42%, in unfenced areas between the KWNZ transmitter building and the KWNZ antenna tower.³ On May 15, 2002, at the request of the agents, KWNZ temporarily powered down to enable the agents to determine if there were other significant RFR contributors in the primary 10 square foot area identified as exceeding the limits. While KWNZ was powered down, the RFR fields in this primary area measured only 0.0115 mW/cm^2 or 5.75% of the RFR MPE limits for the general public. The agents also requested two other broadcasters in the immediate vicinity to power down in turn. While each of the other broadcasters was powered down, the measured RFR fields in the primary area did not change. The agents determined, based on these measurements, that KWNZ was contributing over 94% of the measured RFR field and that KWNZ's operation alone exceeded the MPE limits for the general public by 36% in unfenced areas between the KWNZ transmitter building and the KWNZ antenna tower.

7. Americom submitted its response to the LOI on June 7, 2002. As part of the response, Americom submitted a report of RFR measurements conducted at the McClellan Peak site on May 15, 2002, by an Americom consultant. This report shows that RFR fields in an unfenced area adjacent to the KWNZ tower exceeded the MPE limits for the general public by 18%. Americom stated that out of an abundance of caution, it has contracted for this location to be fenced as if it were in an uncontrolled environment.

8. On November 22, 2002, we issued the subject *NAL* to Americom for a forfeiture in the amount of ten thousand dollars (\$10,000). In its response to the *NAL*, filed December 23, 2002, Americom seeks cancellation of the proposed monetary forfeiture. Americom argues that there is "only circumstantial evidence" of recent public use of the area near the KWNZ transmitter site; that there is "no evidence whatsoever of public use of the particularized ten square foot area" where Americom exceeded the RFR MPE limits; that Americom has in "good faith" treated the KWNZ transmitter site as a "controlled environment" and implemented a "common sense" approach to RFR compliance which is

³ The agents averaged two sets of measurements, one that measured 126% of the MPE limit and one set that measured 159% of the MPE.

consistent with OET Bulletin 65⁴; and that, if it did violate Section 1.1310 of the Rules, the appropriate sanction is admonishment.

III. Discussion

9. The forfeiture amount in this case is being assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁵ Section 1.80 of the Rules,⁶ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Policy Statement*”). Section 503(b) of the Act requires that, in examining Americom’s response, the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁷

10. Section 1.1310 of the Rules requires that licensees comply with RFR exposure limits. Table 1 in Section 1.1310 of the FCC’s rules provides that the public RFR MPE limit for a radio station operating on channel 247 (97.3 MHz) is 0.200 mW/cm². Based on the investigation of the FCC agents, we find that the operation of KWNZ created RFR fields that exceeded the RFR exposure limits for the public in an unfenced, publicly accessible area on both May 14 and 15, 2002.

11. Americom contends that the less restrictive occupational RFR exposure limits apply to the KWNZ transmitter site because there is “only circumstantial evidence” of recent public use of the area near the KWNZ transmitter site. In particular, Americom asserts that “the remote nature” of the KWNZ transmitter site makes it an unlikely destination for the general public; that the *NAL* “fails to establish the *exact location* and *extent* of the trash, [campfire ring] and ATV tire tracks”; that its former Chief Engineer (1984-1998) has never seen fire rings or trash on McClellan Peak Ridge; that its current Chief Engineer (1998-present) recently looked for fire rings and trash on McClellan Peak Ridge but could find no fire rings and “only sparse and old” trash that was “no where near” the KWNZ transmitter site; and that the trash and tire tracks observed by FCC agents may have been left by workers who service the transmission facilities on McClellan Peak Ridge. There is, in fact, ample evidence of recent public use of the area near the KWNZ transmitter site. FCC agents observed: trash in at least four locations throughout the approximately ¼ mile long area on McClellan Peak Ridge where the transmission towers are located; ATV tracks throughout that area; and a campfire ring in the same area. The trash observed by the FCC agents included beer and wine bottles -- not the kind of trash likely to be left by workers who service transmission facilities. The tire tracks observed by the FCC agents were ATV tracks; these tracks were not made by the kind of vehicles that would be used to service the transmission sites on McClellan Peak Ridge. Finally, the agents also observed ATV use by at least two drivers during the inspection of KWNZ. We conclude that the public exposure limits applied to the area in which Americom exceeded those limits.

⁴ OET Bulletin 65, “Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields” (August 1997).

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ 47 U.S.C. § 503(b)(2)(D).

12. Americom also contends that there is “no evidence whatsoever of public use of the particularized ten square foot area” where Americom exceeded the RFR MPE limits. To show that the public exposure limits apply, it is not necessary to establish actual public use of that area. The public use of the area near the KWNZ transmitter site is sufficient to establish the applicability of the public exposure limits.

13. In addition, Americom asserts that it has in “good faith” treated the KWNZ transmitter site as a “controlled environment” and implemented a “common sense” approach to RFR compliance consistent with OET Bulletin 65. In view of the public use of the area near the KWNZ transmitter site, the KWNZ transmitter site was accessible to the general public and, therefore, not a “controlled environment.” Furthermore, even in those situations where the remoteness of a transmitter site allows the licensee to dispense with fencing, OET Bulletin 65 indicates that warning signs at the area of concern may obviate the need for fencing⁸; there were, however, no warning signs which applied to the area where Americom exceeded the RFR MPE limits. Americom argues that signs 10 - 15 feet from the area affected by excessive RFR were sufficient to warn the public. When the agents took the RFR measurements, they looked for warning signs; the only warning signs they observed were at the front of the building at KWNZ’s transmitter site, where they would not be seen by persons approaching the area affected by excessive RFR from a different direction. We find, therefore, that Americom did not have signs sufficient to warn the public.

14. Based on the evidence before us, we find that Americom willfully⁹ and repeatedly¹⁰ violated Section 1.1310 of the Rules by exceeding the RFR MPE limits for the general public and failing to adequately take measures to prevent the public from accessing areas that exceeded the RFR exposure limits.

15. Americom contends that, if it did violate Section 1.1310 of the Rules, the violation is minor and the appropriate sanction is admonishment. Specifically, Americom argues that its violation is “more technical in nature than a general public safety threat” and that, compared to the RFR violation in *A-O Broadcasting Corporation*,¹¹ its violation is “comparatively insignificant.” We do not agree. Any significant violation of those limits is a hazard to human health. Americom contributed over 94% of the RFR field which exceeded the MPE limit by 42% and, by itself, exceeded the RFR MPE limit by 36% -- significant amounts. We find that a monetary forfeiture – not an admonishment -- is the appropriate sanction for this violation. The Commission determined in *A-O Broadcasting Corporation* that \$10,000 is an appropriate base forfeiture amount for violation of the RFR MPE limits. An RFR violation need

⁸ OET Bulletin 65 contains the following guidelines:

There may be situations where RF levels may exceed the MPE limits for the general public in remote areas, such as mountain tops, that could conceivably be accessible but are not likely to be visited by the public. In such cases, common sense should dictate how compliance is to be achieved. If the area is properly marked by appropriate warning signs, fencing or the erection of other permanent barriers may not be necessary.

⁹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹⁰ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is “repeated” if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991).

¹¹ 17 FCC Rcd 24184 (2002); *Forfeiture Order* 18 FCC Rcd 27069 (2003).

not be as significant as A-O Broadcasting Corporation's violation¹² to warrant imposition of the full \$10,000 base forfeiture amount.¹³ We conclude Americom's violation of the RFR MPE limits warrants imposition of the full base forfeiture amount.

16. We have examined Americom's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Americom willfully and repeatedly violated Section 1.1310 of the Rules and that the appropriate forfeiture amount is \$10,000.

IV. Ordering Clauses

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁴ Americom **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for failing to comply with radio frequency radiation maximum permissible exposure limits applicable to transmitters on towers, in willful and repeated violation of Section 1.1310 of the Rules.

18. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁵ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332800006 and FRN 0003-7662-92. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.

19. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Americom's counsel Dennis P. Corbett, Esq., and Phillip A. Bonomo, Esq., Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

David Solomon
Chief, Enforcement Bureau

¹² In *A-O Broadcasting Corporation, supra*, United States Forest Service personnel, who were unaware of the risk, had unrestricted access to an area in an observation tower that exceeded the RFR MPE limits by over 1000%.

¹³ See, e.g., *AMFM Radio Licenses, L.L.C., et al*, 18 FCC Rcd 22769 (2003).

¹⁴ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁵ 47 U.S.C. § 504(a).